

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
On its Own Motion)	
)	
Investigation concerning Illinois Bell)	Docket No. 01-0662
Telephone Company's compliance)	
with Section 271 of the)	
Telecommunications Act of 1996)	

**CONCURRENCE OF CIMCO COMMUNICATIONS, INC.,
FORTE COMMUNICATIONS, INC., AND XO ILLINOIS, INC. TO THE MOTION TO
HOLD ISSUANCE OF FINAL ORDER IN ABEYANCE
AND CONDITIONAL REQUEST FOR FURTHER HEARINGS**

CIMCO Communications, Inc. ("CIMCO"), Forte Communications, Inc. ("Forte"), and XO Illinois, Inc. ("XO"), hereby state their concurrence with the McLeodUSA Motion to Hold Issuance of Final Order in Abeyance and Conditional Request for Further Hearings filed on Thursday, May 8, 2003. In support of this concurrence, CIMCO, Forte and XO state as follows:

McLeod correctly points out that there is now a very large elephant in the room that cannot be ignored. If SB 885 becomes law, this Commission will be forced to approve UNE rates that will violate at least two of the items in the Section 271 checklist. First, the Commission will be forced to use fill rates and depreciation rates that are based on current figures rather than future figures as required by the FCC. Thus, SBC will not be able to meet the pricing requirements contained in Checklist Item 2. Second, SBC will be charging UNE rates that are in excess of comparable retail rates. This price squeeze will violate the "public interest" standard for approval of a Section 271 application.

I. Violation of Checklist Item 2.

The Commission must follow the guidelines set by the FCC in setting prices for UNEs.

In its First Report and Order, the FCC stated:

682. We conclude that, under a TELRIC methodology, incumbent LECs' prices for interconnection and unbundled network elements shall recover the **forward-looking** costs directly attributable to the specified element, as well as a reasonable allocation of **forward-looking** common costs. Per-unit costs shall be derived from total costs using reasonably accurate "fill factors" (estimates of the proportion of a facility that **will be** "filled" with network usage); that is, the per-unit costs associated with a particular element must be derived by dividing the total cost associated with the element by a **reasonable projection** of the actual total usage of the element. Directly attributable **forward-looking** costs include the incremental costs of facilities and operations that are dedicated to the element.¹

The FCC Rule follows this language, stating:

The forward-looking economic cost per unit of an element equals the **forward-looking** economic cost of the element...divided by a reasonable **projection** of the sum of the total number of units of the element that the incumbent LEC **is likely to provide** to requesting telecommunications carriers and the total number of the units of the element that the incumbent LEC **is likely to use** in offering its own services, during a reasonable measuring period.²

Similarly, the FCC defines forward looking economic costs as follows:

§ 51.505 Forward-looking economic cost.

671(d) *Factors that may not be considered.* The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:

(1) *Embedded costs.* Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts.³

¹ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325 (Released August 8, 1996) "First Report and Order." at para. 682. (emphasis added)

² 47 CFR 51.511(a) (emphasis added).

³ 47 CFR 51.505

The discussion in the First Report and Order and the language in the FCC rules is unambiguous. UNE prices must be based on forward looking factors, not current or historic factors. If the General Assembly requires this Commission to approve UNE rates that use fill factors and depreciation rates that are not forward-looking, then SBC will not be able to meet the FCC's pricing guidelines. It will therefore be in direct conflict with Checklist Item 2 - the obligation to provide unbundled network elements at prices that are consistent with the federal Act's requirements.

II. Price Squeeze

As noted by McLeod, the FCC will consider a "price squeeze" caused by the relationship between UNE rates and retail prices as part of its §271(d)(3)(C) "public interest" evaluation. *See Sprint Communications Company, L.P. v. FCC*, 274 F. 3d 549 (D.C. Cir. 2001). SB 885, as amended by Amendment No. 1, SB 885, would create such a price squeeze by mandating certain fill factors and depreciation rates in setting the rates for unbundled loops leased by SBC Illinois to CLECs. Moreover, McLeod also notes that SB 885, as amended by Amendment 1 would relieve SBC of the obligation otherwise imposed by 220 ILCS 5/13-505.1 to adjust its retail rates for the changes in its unbundled loop rates based on the "imputation" test prescribed by Section 13-505.1.

CIMCO, Forte and XO agree with the analysis of McLeod. The DC Circuit has directed the FCC to consider price squeeze arguments in Section 271 proceedings. As of this date, the FCC has only been faced with arguments of CLECs in Section 271 proceedings that the margins between UNE prices and retail rates are insufficient for CLECs to make an adequate profit, or

that profits are insufficient in only certain areas of a state. Here, this Commission and the FCC will be faced with a much different situation. The UNE rates will be higher than retail rates in all areas of the SBC territory. The issue will not be what level of profit is sufficient or whether CLECs can make up inadequate profits in some areas with larger profits in other areas. Everywhere they look, CLECs will be faced with the prospect of losing money on every customer.

CIMCO, Forte and XO therefore support McLeod's position that if SB 885 in its current form becomes law, then the relationship between SBC's increased unbundled loop rates and its retail rates would result in a "price squeeze" as described in Sprint Communications v. FCC, *supra*. The Commission should therefore consider evidence on, and take into account, the impact of unbundled loop rates set pursuant to SB 885 on the public interest under 47 U.S.C. §271(d)(3)(D) and on whether SBC Illinois' UNE rates are TELRIC-compliant.

WHEREFORE, CIMCO, Forte and XO concur with the request of McLeodUSA Telecommunications Services, Inc., that the Commission (1) hold the issuance of a Final Order on Investigation in this docket in abeyance until the later of (i) the conclusion of the current session of the General Assembly and (ii) if proposed legislation currently pending in the General Assembly as Senate Bill 885 ("SB 885") is passed, until SB 885 becomes law by signature of the Governor or operation of law pursuant to Article IV, Section 9(a) of the Constitution of 1970, or, if vetoed by the Governor, until the procedures specified in Article IV, Section 9 of the Constitution of 1970 for vetoed bills have been completed; and (2) if SB 885 is enacted, to hold further hearings prior to issuance of the final Order to take evidence on the determinations to be made in this docket, pursuant to 83 Ill. Adm. Code 200.870.

Respectfully submitted,

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Dated: May 9, 2003

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On its Own Motion)	
)	ICC Docket No. 01-0662
Investigation concerning Illinois Bell)	Phase II
Telephone Company's compliance)	
with Section 271 of the)	
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NOTICE OF FILING

PLEASE TAKE NOTICE that I have this 9th day of May, 2002, filed with the Clerk of the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, via e-Docket the Response of CIMCO Communications, Inc., Forte Communications, Inc. and XO Illinois, Inc. to McLeodUSA Telecommunications Services, Inc.'s Motion to Hold Issuance of Final Order in Abeyance and Conditional Request for Further Hearings in the above-referenced docket.

PROOF OF SERVICE

Thomas H. Rowland, being first duly sworn, deposes and says that he is an attorney representing CIMCO Communications, Inc., Forte Communications, Inc. and XO Illinois, Inc. and that on May 9, 2003, copies of the Response of CIMCO Communications, Inc., Forte Communications, Inc. and XO Illinois, Inc. to McLeodUSA Telecommunications Services, Inc.'s Motion to Hold Issuance of Final Order in Abeyance and Conditional Request for Further Hearings were served on all parties on the service list via E-Mail.

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